

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,) 8:13CR105
)
vs.)
) Omaha, Nebraska
TIMOTHY DEFOGGI,) January 5, 2015
)
Defendant.)

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE LAURIE SMITH CAMP
CHIEF UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

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Proceedings recorded by mechanical stenography, transcript
produced with computer.

1 (At 2:35 p.m. on January 5, 2015, with counsel for the
2 parties and the defendant present, the following proceedings
3 were had:)

4 THE COURT: We are here in the matter of the United
5 States versus Timothy DeFoggi, Case Number 8:13CR105.

6 Will counsel please enter their appearances.

7 MR. BECKER: Keith Becker for the United States, your
8 Honor.

9 MR. NORRIS: Michael Norris for the United States.

10 THE COURT: Good afternoon.

11 MS. CHANG: Sarah Chang for the United States, your
12 Honor.

13 THE COURT: Very good. Ms. Chang is joining us by
14 telephone. And thank you for chiming in. I'm glad that they
15 got you connected. Good afternoon.

16 MS. CHANG: Thank you, your Honor.

17 MR. DORNAN: Good afternoon, your Honor; Stu Dornan
18 on behalf of Mr. DeFoggi.

19 THE COURT: Very good. Good afternoon to both of
20 you.

21 The matter we're addressing is the sentencing.

22 After a jury trial on Counts I through VII of the
23 indictment, the defendant was found guilty of those counts.

24 And a motion was filed to dismiss Counts II and III as
25 lesser included offenses, and those counts have been dismissed

1 by the Court's order of December 30, 2014.

2 Mr. Becker, shall I address you as opposed to both of
3 you? Mr. Norris is nodding.

4 Mr. Becker, did you receive the revised presentence
5 investigation report in this case and the Court's tentative
6 findings?

7 MR. BECKER: I did, your Honor.

8 THE COURT: Very good.

9 Mr. Dornan, did you receive those documents and discuss
10 them with your client?

11 MR. DORNAN: I did, your Honor.

12 THE COURT: The defendant's objections appear at
13 filing 267. One of the objections had to do with Counts II
14 and III being lesser included offenses, and so that issue is
15 now moot.

16 The other objections largely relate to the defendant's
17 assertion of his innocence. And he takes issue with the
18 government's version of the offense that is set out in the
19 presentence investigation report.

20 Those objections are denied. The defendant's motion for
21 variance appears at filing number 269.

22 And generally as most of the lawyers know, perhaps not
23 Mr. Becker because he doesn't appear here as often, but I
24 generally, for the record, deny a motion for a variance,
25 recognizing that the guidelines are advisory, recognizing that

1 I can sentence outside the guideline range, considering all
2 the statutory sentencing factors -- and in fact, I may have an
3 obligation to if those factors indicate that I should.

4 Of course, I am bound by the statutory mandatory minimum.

5 So Mr. Dornan, do you want a separate argument on the
6 motion for variance that appears at 269 -- it's actually
7 titled Sentencing Memorandum -- or is it agreeable to you if
8 those arguments are consolidated with allocution?

9 MR. DORNAN: I would prefer the second way and have
10 it consolidated, Judge. Thank you.

11 THE COURT: Very good.

12 Then, because the Sentencing Memorandum was actually
13 filed as a pending motion -- at least it has a gavel next to
14 it which means I have to take some action on it -- I will deny
15 it for the record, but keeping an open mind as to what is the
16 appropriate sentence in this case, considering all the
17 statutory sentencing factors.

18 Mr. Becker, did you receive the sentencing recommendation
19 in this case?

20 MR. BECKER: Yes, your Honor.

21 THE COURT: And Mr. Dornan, did you also receive the
22 sentencing recommendation and discuss it with your client?

23 MR. DORNAN: I did, your Honor.

24 THE COURT: I will go through the advisory
25 guidelines.

1 And then I do understand, Mr. Dornan, that you may have
2 some documents that you want me to receive and consider as
3 exhibits. And I will make sure that you have an opportunity
4 to address that.

5 MR. DORNAN: Thank you, Judge. There are three short
6 documents, which I have provided to counsel.

7 THE COURT: Okay. Very good.

8 I'll go through the advisory guidelines. The base
9 offense level under Section 2G2.6(a) is level 35. There's an
10 upward adjustment of four levels because of the age of the
11 victims involved in the pornographic material. There's an
12 upward adjustment of two levels because of the use of the
13 computers, which brings us to an adjusted offense level of 41.

14 The defendant's criminal history category is category I.

15 The range of imprisonment under the guidelines on Count I
16 is 324 months to 405 months, with a 20-year statutory
17 mandatory minimum.

18 As noted, Counts II and III have been dismissed.

19 On Counts IV through VII, the statutory maximum is 20
20 years, and that is also the guideline. The supervised release
21 range for all counts is five years to life.

22 The fine range is 25,000 to \$250,000. And the special
23 assessment now totals \$500 because there are only the five
24 counts remaining.

25 And I do note, for the record, that the counts are

1 grouped pursuant to Guideline Section 3D1.2(d).

2 The parties have indicated they've received the
3 sentencing recommendation. The recommendation is for a
4 sentence of 324 months on Count I and 240 months concurrent on
5 Counts IV through VII, to be followed by a term of supervised
6 release that would be a lifetime term.

7 The imposition of a fine is not recommended because the
8 defendant at this stage is unable to pay a fine and is not
9 expected to become able to pay a fine. And as noted, the
10 special assessment now totals \$500.

11 So we will proceed to allocution.

12 And at that juncture, Mr. Dornan, of course, you go
13 first. And if you wish me to consider some other documents --
14 I will note that I have reviewed and considered those which
15 were already sent to me and which appear in the filing in this
16 case.

17 You may proceed.

18 MR. DORNAN: Thank you, Judge.

19 I have presented to your courtroom deputy an item marked
20 as Exhibit 10, which is an Evidence Recovery Log that's dated
21 April the 9th, 2013, that I'd like to offer.

22 THE COURT: As you may recall, we start defense
23 exhibits at number 100 generally. And I don't recall where
24 the exhibit numbers left off at the time of the trial.

25 Mr. Dornan, was there a reason that you started with

1 number 10?

2 MR. DORNAN: Yes. When we were compiling these
3 exhibit lists, my paralegal did speak with the court
4 reporter with respect to -- or somebody in your office.

5 THE COURT: Well, this is not a big deal. We just
6 want to make sure that -- for purposes of the record that the
7 appellate court gets the exhibits in an orderly manner.

8 So let me check with Ms. Frahm about what the last
9 exhibit number was for the defense. And I realize,
10 Mr. Dornan, you were not counsel of record at the time of
11 trial. This is not a criticism at all.

12 COURTROOM DEPUTY: One moment, Judge. The next
13 number should be 307.

14 THE COURT: All right. Mr. Dornan, would you have
15 any objection to me relabeling these exhibits as 307, 308 and
16 309?

17 MR. DORNAN: No, your Honor.

18 THE COURT: I'm going to ask Ms. Frahm to do that,
19 and that will help make sure we don't have two exhibits in the
20 record that have the same number and could potentially cause
21 confusion.

22 MR. DORNAN: Thank you, your Honor.

23 THE COURT: All right.

24 What has been titled Evidence Recovery Log is now labeled
25 Exhibit 307. What is entitled Federal Bureau of Investigation

1 appearing as a report dated April 9, 2013, is labeled 308.

2 And what appears to be the handwritten statement that begins
3 with the word "overview" is labeled Exhibit 309.

4 And Mr. Dornan, I guess my first question about these
5 exhibits -- I understand you're offering them at this
6 juncture. And my question is, are these exhibits relevant to
7 sentencing, or are these exhibits that the defendant wanted to
8 have considered at the time of trial in connection with the
9 issue of guilt?

10 MR. DORNAN: The second -- the latter, your Honor.
11 These are -- I did not provide these as part of my sentencing
12 presentation. These are something that Mr. DeFoggi believes
13 are relevant for the Court to consider.

14 THE COURT: All right. Any objection to Exhibits
15 307, 308 and 309?

16 MR. BECKER: No, your Honor.

17 THE COURT: All right. I will receive them for the
18 record, recognizing that the jury found the defendant guilty
19 beyond a reasonable doubt on all counts.

20 And you can explain to me what, if any, relevance these
21 may have for the purpose of sentencing. But they will be a
22 part of the record.

23 MR. DORNAN: Thank you, your Honor.

24 THE COURT: You may proceed.

25 MR. DORNAN: Your Honor, I would -- first, in my

1 Sentencing Memorandum, I've asked the Court to consider
2 finding the statute -- the child exploitation enterprise --
3 unconstitutional in this case based on the offense that
4 Mr. DeFoggi was convicted of and the punishment being grossly
5 disproportionate to what he was actually convicted of.

6 I know this Court is well aware of the continuum in
7 Chapter 110 concerning offenses involving child pornography
8 and child exploitation.

9 If you take a look at the beginning of the continuum,
10 Judge, it's "access with intent to view" as being the least
11 serious. And then you go to "possession", then you go to
12 "receipt", then you go to "distribution", then you go to
13 "production", then you go to "hands-on offenses".

14 Some of the hands-on offenses and sexual abuse penalties
15 are less than what Mr. DeFoggi faces here with respect to the
16 minimum 20 years. And I would argue that the position of
17 Mr. DeFoggi under the guidelines is just -- basically amounts
18 to cruel and unusual punishment, concerning that whole
19 statutory scheme.

20 The other defendants in this matter -- I think most of
21 them have been sentenced, Judge, and I think most of them were
22 sentenced by Judge Bataillon. Maybe all of them were
23 sentenced by Judge Bataillon.

24 Mr. McGrath, who is the person who was responsible for
25 operating and administering the PedoBook website, received a

1 20-year sentence of imprisonment.

2 Mr. McMillan, who this Court heard as a witness, if you
3 will recall, received a 12-year sentence of imprisonment. And
4 if you'll recall, Judge, the fantasy chat attributed to him
5 was more egregious than the fantasy chat attributed to
6 Mr. DeFoggi.

7 Anything I say here, Judge, just so Mr. DeFoggi is aware,
8 he stands on his plea of not guilty. And I'm not admitting
9 anything in that regards that he admits anything in this, just
10 so he's aware of that, for purposes of sentencing.

11 The other defendants, Judge, Jason Flanary received 20
12 years; Zackary Austin, 16 years; Wesley Cameron, 15 years.
13 They, of course, pled -- Flanary, Austin and Cameron pled to a
14 lesser offense of conspiracy to distribute.

15 So your Honor, you have a situation where a individual,
16 who has no past criminal history whatsoever, whose prior track
17 record is of significant assistance, not only to his country
18 through the military, to the United States government, but
19 also to his community of very fine, long-standing
20 contributions and benefits with respect to his roles as a --
21 both in the state system and at the highest level of the
22 federal government.

23 I think all of those things, Judge, at the age of 56, and
24 the fact that he has not been convicted of anything else, are
25 very important factors with respect to the Court constructing

1 and fashioning an appropriate sentence.

2 He's 56 years of age. Whatever sentence the Court
3 imposes here is going to -- if the Court imposed a mandatory
4 minimum, it's going to place him outside of society for a
5 significant period of time, and perhaps for the rest of his
6 natural life.

7 All of those things, Judge, I think are very important,
8 again not sentencing him to something more than the lower end
9 of the continuum.

10 I realize that what is attributed to him is -- certainly
11 is -- would be considered vile and provocative. But it was --
12 it was in the context of a fantasy chat. And I think it's
13 very important for the Court to sentence him in accordance
14 with the "access with intent to view".

15 As I mentioned, Judge, in my Sentencing Memorandum, he
16 was not part of operating, administering, or controlling this
17 website. He did not enforce any rules on PedoBook. He did
18 not accept any users into PedoBook.

19 He did not contribute any child pornography into
20 PedoBook, did not post any formal notices seeking child
21 pornography on PedoBook, did not distribute any child
22 pornography, did not initiate polls in PedoBook, did not
23 create tag clouds, did not have possession of child
24 pornography images from PedoBook, and very importantly did not
25 financially benefit from PedoBook or otherwise from child

1 pornography.

2 You have a number of exhibits which show that he has very
3 good family support, family ties to the community. He's not
4 in need of educational or vocational rehabilitation, Judge.

5 I've set forth a number of instances in your sister --
6 not sister, your fellow judges here in this court relating to
7 their problems with the excessive nature of the child
8 pornography guidelines. I reference Judge Bataillon, Judge
9 Gerrard, Judge Bennett in the North District of Iowa, where
10 they have found that the child pornography guidelines should
11 be deconstructed, that they're not representative of empirical
12 data from the Sentencing Commission.

13 For all those reasons, Judge, I would respectfully ask
14 the Court to consider the child exploitation enterprise
15 statutes unconstitutional and sentencing Mr. DeFoggi to below
16 the mandatory minimum.

17 In the alternative, Judge, if the Court chooses not to do
18 that, to sentence him to the mandatory minimum of 20, and run
19 any other sentences concurrent.

20 THE COURT: Thank you, Mr. Dornan.

21 Mr. DeFoggi, is there anything that you would like to say
22 today in connection with the sentencing?

23 THE DEFENDANT: Yes, there is.

24 I wanted to comment on the PSI first off. And you have
25 the letter from my previous attorney where the content was

1 from my son's computer, and the search -- or the exhibits that
2 Mr. Dornan gave you. The thumb drive in question is also in
3 the PSI, it was found in my son's room.

4 You also have the statement given to [sic] my son at the
5 time he was interviewed by the FBI where he states that the
6 eMachine, that nickname Scooter in the PSI, is also his. And
7 I think that adds volumes of information that's not relevant
8 to my PSI, all of that coming from my son's computer and his
9 thumb drive. So I just wanted to point that out to your
10 Honor.

11 Then I wanted to give you the -- I'm sorry. I want to
12 give you the other side, the part of me you didn't hear in
13 court.

14 I know you had three days of testimony which made me look
15 like I don't know what. And I wanted to testify on the actual
16 allegations in this case, but my former attorney told me it
17 wasn't a good idea, so I wasn't allowed to do it.

18 And I did to want highlight -- I had written out another
19 letter to your Honor that -- and I'll just read parts of it,
20 okay?

21 THE COURT: Be sure you read slowly. Sometimes
22 people read faster than they talk extemporaneously so just
23 take it slowly so we can make a record.

24 THE DEFENDANT: The first part, as I said, I wanted
25 you to see the real me, the real side of me that you didn't

1 get to see in court.

2 As Mr. Dornan said, I've spent probably 20 years working
3 for the government and in the military, serving my country, as
4 a former federal law enforcement agent, as an innovator of
5 technology for the intelligence community, the IN, NSA, and as
6 director of cyber security for a federal agency. And that was
7 in my blood. I loved every part of it.

8 And you know that Snowden and WikiLeaks certainly used
9 Tor to exfiltrate classified data out of government networks.
10 And that was my passion, to defeat Tor as part of my job.

11 I also wanted to take -- I'm sure you've read the letter
12 I wrote you originally, but I want to tell you how important
13 my family is to me, and my --

14 I want to address my Christian background, because I was
15 portrayed as certainly not being Christian at all in this
16 trial. And I wanted badly to address who I really am and
17 address the charges, but that never materialized.

18 But my childhood, I was saved back when I was around 6,
19 attended church regularly. But then in adulthood, I was kind
20 of irregular church attendance and not much in the way for
21 prayer life.

22 I'm kind of in -- I'm thankful actually that this
23 happened, that this got my attention. My life was mostly work
24 and my family. And I never gave God -- I didn't give him much
25 time. I went to church once a month maybe, and I never gave

1 him the time he deserved.

2 So when I got arrested and I prayed about it, I felt
3 pretty guilty that I didn't go to him any other time until I
4 needed him. So that's something I've had to contend with.

5 I lost my mother while I was in jail; didn't get to see
6 her, didn't get to go to her funeral. She was all I had in my
7 family pretty much, never grew up with my father.

8 Since being moved to Douglas County, I've been in the God
9 Mod the entire time. Before that, I was in Saunders and Cass.
10 I read every -- I read the Bible from cover to cover. I've
11 read a Bible encyclopedia, everything I can get my hands on,
12 which I'm so thankful that -- if I had been out, I never would
13 have taken the opportunity to do any of that. Now in the God
14 Mod over the last four months, I'm so much closer to God than
15 I've ever been in my life. And I'm sorry I didn't do that
16 before.

17 I just wanted you to know the real side of me that didn't
18 get presented at trial. And I ask that you consider that,
19 consider my career, what I've done, and why I was doing it,
20 and the person that I really am.

21 That's what I wanted to tell you, your Honor.

22 THE COURT: Thank you, Mr. DeFoggi.

23 Mr. Becker?

24 MR. BECKER: Thank you, your Honor.

25 THE COURT: I did receive the government's memorandum

1 regarding sentencing.

2 MR. BECKER: Indeed, your Honor, and I'll try not to
3 be repetitive of that, knowing that the Court has received and
4 reviewed that.

5 As the Court is well aware, the PedoBook was itself a
6 social networking site for pedophiles and child pornographers.
7 It was an intensive organization with a massive and global
8 membership; thousands of users and members, thousands -- tens
9 of thousands of images of children, hundreds or thousands of
10 children were exploited through this site and by its users and
11 members.

12 I think it's important, and I think the Court will
13 recognize and should recognize the unique and serious danger
14 that organized child pornography communities like PedoBook
15 pose to children, not only in the United States, but all
16 throughout this world; and that that problem, that danger is
17 something that is unique and particular to these sorts of
18 communities and one that this Court should be very greatly
19 concerned about.

20 That is, of course, a danger that, one, Congress has
21 recognized certainly in setting tiers of punishments for
22 different types of offenses, different types of child
23 pornography offenses. It's one of the reasons why the child
24 pornography enterprise statute carries the 20-year mandatory
25 minimum that it does as distinguished from other particular

1 statutes.

2 But, as we've pointed out in our sentencing paperwork as
3 well, that is also a concern in reality that the Sentencing
4 Commission has recognized. And while I understand that the
5 defense wishes that this Court would view this sort of case in
6 light of an ordinary, passive child pornography recipient type
7 of case where there may be more argument to be made about the
8 current sentencing guidelines and whether they focus on the
9 right factors, the fact is that the Commission in its study,
10 as we pointed out, was very, very clear about the particular
11 dangers of organized child pornography communities.

12 I'll just quote it briefly, in the Commission's report on
13 the guidelines: Child pornography offenders who are involved
14 with others in Internet-based child pornography communities
15 normalize and validate sexual exploitation of children,
16 promote the market for child pornography, and may directly or
17 indirectly encourage others to produce new images of child
18 pornography.

19 When these sorts of offenders are able to find these
20 communities, become members of them, share their particular
21 desires for particular types of child pornography, to
22 encourage others to create new child pornography, because when
23 they network like this, they've already collected everything
24 that's out there. And what they want is to find new or more
25 violent and more particular child pornography.

1 And we saw exactly that sort of behavior in the
2 defendant's conduct on the PedoBook website. That creates a
3 whole new scheme of danger to children beyond the more sort of
4 passive collection that I think the defense wishes to paint
5 Mr. DeFoggi's conduct under.

6 It's a meaningful distinction. And then even in its
7 conclusions, the Sentencing Commission in one of the, as they
8 called it, primary factors that should be considered in
9 imposing sentences were the child pornography guidelines to be
10 amended, is the degree of an offender's engagement with other
11 offenders, in particular in an Internet community devoted to
12 child pornography and child exploitation.

13 And that is exactly the sort of conduct that we are
14 dealing with in this particular case, and exactly the sort of
15 conduct that Mr. DeFoggi engaged in and why he's here facing
16 sentencing today.

17 He, individually, had a choice in how he wanted to
18 interact with his fellow members of the PedoBook website. As
19 the Court heard in trial testimony, it was possible to
20 interact with this site passively. He could have gone there
21 as a purely anonymous user, never registered a screen name,
22 never created a persona, never engaged with any user. And he
23 could have done that and browsed some of the child pornography
24 on that site entirely passively.

25 He chose not to. The choice that he made was to be an

1 active participant, to make himself a member, to create
2 himself a persona, to interact with others, to solicit -- and
3 I think the defense in their papers I think really just much
4 too narrowly tries to define what it means to solicit in a
5 notice or advertisement under the child pornography
6 advertising statute.

7 The fact is, by reaching out to other users looking for
8 particular types of child pornography, that is a solicitation.
9 And it's just the sort of solicitation that that statute,
10 which carries a 15-year mandatory minimum, criminalizes; that
11 is, looking to others for particular types of child
12 pornography that can then be shared. And that is absolutely
13 one of the things that he did on this site.

14 And of course, the Court has seen both in the presentence
15 report and heard and seen during trial the particular topics
16 that the defendant discussed in his private messages with
17 other users, exposing and explaining his particular interest
18 in the violent sexual abuse of very young children.

19 And frankly, I think the defense wants, of course, to
20 paint that simply as fantasy chat. And I just don't think it
21 holds. And that's because of the particular environment where
22 he was acting in. Because of, in part, the anonymity that the
23 Tor network provided and that the PedoBook platform operating
24 on the Tor network provided, and because of the normalization
25 effect that happens when these sorts of offenders interact

1 with other like-minded people who share those same desires,
2 what you get in those chats and those private communications
3 are, in fact, the true desires, the unvarnished desires, where
4 he is free and able to express exactly what it is that he is
5 interested in and wants to do because he knows he's anonymous,
6 he knows or believes that he can't be caught, that his actual
7 identity can't be found out.

8 And so this Court, I think, should be more concerned
9 about the content of those chats from the perspective of is
10 Mr. DeFoggi a danger to children and how does that play into
11 the sentencing factors in this case.

12 And so whereas they wish to paint that as fantasy, I
13 think this Court, because of the particular context, can see
14 it as a troubling statement of actual desires.

15 There's no question the defendant has had a long career
16 in public service and in working for the federal government.
17 It is unfortunate that the skill set that he developed through
18 the government, through his government work, and through the
19 training that he was provided and the experience that he
20 gained, also made it possible for him to take the sort of
21 steps that he did to make it difficult for him to be caught.

22 You know, all of the skills he developed as a government
23 IT professional, as a security professional, or however you
24 want to describe his experience, the fact is he used it to
25 promote his illegal behavior. He used that experience to --

1 used that knowledge to find a site on the Tor network. He
2 used that experience to set up his computer in a way that he
3 would be able to -- at least certainly he thought -- erase the
4 activity that -- erase the evidence of the sorts of activities
5 that he was engaging in online, to keep those sorts of
6 activities secret from those closest to him even within his
7 own household, which he did, we know, for quite some period of
8 time.

9 And so certainly the Court will take that sort of -- that
10 service and that experience into account. But it's equally as
11 probative to see how he used it and, in fact, how he used it
12 to promote his illegal activity in this particular case.

13 The use of the Tor network, I think, in this particular
14 context is also -- it's important. It's something the Court
15 should take into consideration as a part of the nature and
16 circumstances of the offense here.

17 There's no question there are a multitude of proper,
18 legal, important uses of anonymity services like Tor. And
19 there are plenty of legal use for it. It's certainly -- it's
20 unfortunate, and I think a very dangerous proposition, that it
21 is adopted as it is in this sort of context, not only for
22 criminal activity but for activity that involved child
23 exploitation.

24 Your Honor has seen certainly the evidence of the
25 thousands of members and users of these sites, the vast

1 majority of whom go unidentified and go unprosecuted because
2 of the technology that is available and mobilized by them.

3 And so that should be of a great concern and I think it
4 plays into the 3553 factors in terms of general deterrence;
5 that it is important for this Court, from the government's
6 view, to make a strong statement about inappropriate, illicit
7 use of these sorts of anonymizing services because of the
8 danger that it presents to children where this sort of
9 activity in exploiting children can be done openly and
10 notoriously without fear of detection by law enforcement.
11 That presents a great danger to children, makes them much more
12 vulnerable to abuse and to new abuse; make the offenders who
13 are involved in this more willing to share new images of child
14 pornography because they believe that they can hide behind
15 these sorts of anonymous services.

16 So again, as we look at arguments against the current
17 framework of the Sentencing Guidelines and possibly an
18 amendment to them at some point down the road, they need to be
19 replaced with something. They're not going to be simply
20 thrown away. They're going to be replaced with factors that
21 are probative, that remain probative. As the Commission has
22 already said, one of those factors should be the degree of
23 interaction with an online community like this one.

24 And certainly, we would contend that another of those
25 factors would be the use of anonymization services by

1 defendants to exploit children. So we'd ask the Court to
2 consider that as well.

3 In terms of a couple of the defendant's, I think, legal
4 objections, I'll just address them briefly.

5 First, in terms of the child exploitation enterprise
6 statute, the statute itself makes no distinction among or
7 between the violations of Chapter 110 that may form predicates
8 for a violation of the statute.

9 So 2252(g) [sic] states that the three offenses must be
10 violations of Chapter 110. And it doesn't subdivide, it
11 doesn't categorize, it doesn't say they have to be serious
12 violations or significant violations or only some violations
13 and not others. The statute itself doesn't make those sorts
14 of distinctions.

15 And so I don't believe that it's relevant, for the
16 Court's analysis here, to choose between, well, wouldn't it be
17 worse -- or a worse violation of 2252(g) if it were three
18 production offenses as opposed to three access with intent to
19 view. The statute doesn't make that distinction and that's
20 the choice that Congress made when drafting that statute.

21 Whether the access with intent to view child pornography
22 is more or less serious than other child pornography statutes,
23 one, I don't think is relevant to the legal analysis here; but
24 two, I know that it's not relevant to the children that are
25 victimized. And that is something the Court should definitely

1 take into consideration when addressing the defendant's
2 argument there.

3 The child victim -- to the child victim, the child who
4 has been exploited, who has been abused, whose images have
5 been accessed, trafficked, distributed, received, whatever
6 action word we put in front of it, that child has been
7 victimized and it is that child's victimization that Congress
8 is taking account of when putting together these statutes and
9 that statutory regime.

10 And so we can say, well, one statute is more serious
11 because the mandatory penalty or the maximum penalty is
12 higher. But we can also say they are all of equal seriousness
13 because they all deal with a child who has been abused and
14 victimized and about accounting for that victimization.

15 And of course, the enterprise statute accounts for a
16 particular type of victimization; that is, one that is done in
17 concert with others and one that involves repeated felony
18 violations of Chapter 110. And there's just no question that
19 those repeated violations were proven in this case and that
20 the defendant engaged in that activity with his many other
21 co-conspirators on the PedoBook website.

22 In terms of the other defendants in this case and looking
23 at the other prosecutions here in this district, a couple of
24 important points:

25 First, there were offenders who are charged in this

1 district who accessed PedoBook anonymously, without
2 registering a user name or a screen name. They are not
3 charged with enterprise, they're charged with receipt and
4 attempted receipt, with access with intent to view child
5 pornography, because they interacted with that site
6 differently than Mr. DeFoggi did.

7 And so there is a distinction to be drawn between the
8 sort of activity someone engaged in on these sites. And it's
9 been drawn and it's been drawn in this district in the context
10 of other cases of users who accessed the PedoBook website.

11 Other defendants the defense has referenced -- I know
12 we've put together a chart to try to lay out the
13 distinguishments between other defendants who used PedoBook,
14 who were members of PedoBook, and Mr. DeFoggi.

15 But to be clear, Aaron McGrath, the administrator of this
16 site, as well as others, one, of course, pled guilty; two,
17 cooperated with the government and received credit for that
18 cooperation. So his 20-year sentence occurred only after
19 those two factors were taken into account. And as I noted for
20 the Court, the government requested a sentence of 30 years in
21 that case.

22 With respect to Jason Flanary, pled guilty to child
23 exploitation enterprise, not to any lesser count. And he was
24 the first to plead guilty and received a 20-year sentence, the
25 mandatory minimum in that case, again after accepting

1 responsibility.

2 Cameron, who was another member of PedoBook, pled guilty
3 to conspiracy to advertise child pornography. He did --
4 although he didn't receive 5K credit, he did make attempts to
5 cooperate with the government, obviously took responsibility
6 and received credit for that acceptance of responsibility.

7 Zachary Austin, who was the defendant's codefendant,
8 although he did plead guilty to conspiracy to distribute,
9 because of a prior conviction, the mandatory minimum for his
10 offense of conviction was still 15 years. And so it's not as
11 if he got a departure down to a five-year minimum sort of
12 plea. His mandatory minimum on his count of conviction was 15
13 years. He accepted responsibility and that's the sentence
14 that he got.

15 And finally, Charles McMillan, who testified in this
16 case, also pled to conspiracy to advertise, received credit
17 for his plea as well as for the cooperation he offered in his
18 -- as the Court heard, his direct contact with Mr. DeFoggi
19 that did assist in the identification. And of course, he
20 assisted at trial.

21 So there's a real meaningful distinction to be drawn
22 between Mr. DeFoggi's case and the cases of the other
23 defendants in this matter.

24 I should also just note in terms of McGrath, the
25 administrator, his sentence was not a rejection of the

1 guidelines wholesale; in fact, far from it. He did receive a
2 guideline sentence. The sentencing judge in that case, Judge
3 Bataillon, adjusted his guidelines down based on some
4 objections to particular guideline provisions.

5 So it was adjusted -- his sentence was adjusted for
6 cooperation, first of all; for acceptance, and then certain
7 enhancements were not applied by the trial judge. So it
8 wasn't as if there was some wholesale rejection again in the
9 context of another defendant who was being adjudicated for
10 enterprise as opposed to a possession/receipt sort of
11 scenario.

12 And just to very briefly address the defendant's
13 comments, we should be very clear -- and the Court saw this,
14 of course -- as much as the defendant wants to talk about
15 other computers in his household that had child pornography
16 and who they belonged to, one, it's clear he had access to all
17 of them; two, as the Court will recall, the defendant's
18 computer was in his hands when law enforcement had to pry it
19 out of his hands upon executing the search warrant while he
20 was downloading a child pornography video from a Tor network
21 child pornography website. There's just no mistaking that he
22 was the person who is responsible here, much as he wants to, I
23 think, vaguely shift responsibility onto his adopted son, who,
24 of course, testified in this case and denied having anything
25 to do with any child pornography whatsoever.

1 And so I know the Court will certainly consider that
2 evidence when evaluating the defendant's statements here
3 today.

4 With that, your Honor, we do believe that a guideline
5 sentence is warranted here. Consistent with our
6 recommendations, we would recommend a high end guideline
7 sentence.

8 Thank you.

9 THE COURT: Thank you, Mr. Becker.

10 Well, as the lawyers know, and no doubt as Mr. DeFoggi
11 knows, I'm required to consider a number of factors when
12 imposing a sentence.

13 First, I will decline defense counsel's invitation to
14 declare the child pornography statutes unconstitutional. I
15 recognize that Congress from time to time, from year to year,
16 passes different laws. And sometimes things are made
17 criminal, sometimes they are made not criminal. And sometimes
18 penalties are increased, and sometimes they're decreased.

19 And that reflects a changing society and a change in
20 priorities. And I have respect for the role of Congress in
21 deciding what is legal and what is not legal and what
22 penalties for crimes should be.

23 I am not aware of any court that has declared these
24 offenses and the penalties for the offenses to be cruel and
25 unusual punishment under the Eighth Amendment of the

1 Constitution, so I will not be the one who does that.

2 I'm required to consider punishment. But frankly, as the
3 lawyers know, I don't give a lot of weight to punishment
4 because I don't think it's a particularly useful concept. I
5 put more weight on the concepts of general deterrence,
6 specific deterrence, and the need to protect society.

7 While I think that prisons can and many do provide useful
8 opportunities for rehabilitation, the Supreme Court has said
9 we are not to send people to prison for the purpose of
10 rehabilitation. And so I am giving that very little weight in
11 my calculus.

12 I do recognize the specific characteristics and the
13 history of Mr. DeFoggi. And I appreciate the fact that he has
14 reached a stage where he is at midlife or beyond and had no
15 criminal history when he came into this court.

16 I recognize that he has done many things throughout his
17 life that were of service to his country. And I don't
18 diminish those in any way. I recognize the good that he has
19 done in his life to the extent that that's been brought to my
20 attention.

21 I am weighing the element of general deterrence. I think
22 it is important that people realize the lives of children are
23 destroyed when they are subjected to sexual abuse. And they
24 are harmed again and again very seriously when their sexual
25 abuse is placed on the Internet and circulated for others to

1 enjoy.

2 And this particular network involved not just child
3 erotica, but it involved abuse of children to the most extreme
4 extent, all the way down to newborn infants being raped and
5 brutalized. So we would hope that severe penalties would
6 deter other people from committing similar offenses.

7 I'm also considering specific deterrence; and that is, of
8 course we want to be sure that Mr. DeFoggi does not engage in
9 similar conduct in the future.

10 But probably most important is the protection of society
11 from future criminal activity. And I recognize and I
12 appreciate the fact that there was no evidence that
13 Mr. DeFoggi had engaged in hands-on abuse of children.

14 But the jury found, based upon the evidence presented,
15 beyond a reasonable doubt that Mr. DeFoggi was the individual
16 using the screen name/computer name or alias fuckchrist and
17 PTasseater. And that individual is a very dangerous
18 individual.

19 Mr. DeFoggi is a very intelligent person. And he's a
20 person with very high levels of computer skills. Perhaps he's
21 among a handful of people in the country who have such high
22 levels of computer skills and such knowledge of the Tor
23 network, also known as The Onion Router. That makes him more
24 dangerous, frankly.

25 The dialogues that he was involved with and participated

1 in did indicate that he was not just accessing the child
2 pornography, but he was encouraging others to create child
3 pornography through the abuse of children.

4 And, of course, he was attempting to meet with the
5 individual who went by the screen name Toddler Lover to
6 discuss their mutual fantasies and actually to plan the
7 abduction, torture, rape and murder of children as young as
8 infants.

9 So while this may have been fantasy discussion and may
10 have been an effort on the part of Mr. DeFoggi to connect with
11 other men who had similar fantasies, it is certainly
12 information that would give anyone pause as to whether
13 Mr. DeFoggi should be in a position where he would have the
14 ability to follow through on those fantasies, especially since
15 he was taking the additional steps of encouraging others to
16 create pornography and trying to connect with someone who had
17 the same goals that he had in acting out on the fantasies.

18 Having said all of that, generally I do sentence somewhat
19 below the guideline ranges in connection with the child
20 pornography cases because those guideline ranges are so very,
21 very high. And I do recognize people do change over the year,
22 they do change over the decades.

23 And we're in a sentencing range here where the defendant
24 will be incarcerated for decades, and he will be looking at a
25 lifetime of supervised release with restrictions on his

1 activities.

2 So I'm supposed to impose a sentence that is sufficient
3 but not greater than necessary to serve all of the statutory
4 sentencing factors. And I find that a sentence of 300 months'
5 incarceration to be followed by lifetime supervised release is
6 sufficient but not greater than necessary to serve all the
7 statutory sentencing objectives. That is the sentence that I
8 impose.

9 I will not impose a fine because the defendant does not
10 have the ability to pay and is not expected to become able to
11 pay a fine.

12 I should note that the term of incarceration is
13 concurrent. So all of the counts, Count I and Counts IV
14 through VII will run concurrently. The term of 300 months is
15 on Count I. And on Counts IV through VII, I impose a term of
16 240 months to run concurrent with the term on Count I.

17 The special assessment will be \$500. That represents
18 \$100 per each of the five remaining counts.

19 I intend to impose the special conditions of supervised
20 release set out in the sentencing recommendation. Are there
21 any objections to those, Mr. Becker?

22 MR. BECKER: Judge, just a note, the statutory
23 maximum on Counts IV to VII would be 120 months on each count.

24 THE COURT: Oh, my apologies. Okay. Then the
25 sentencing recommendation is incorrect, is that --

1 MR. BECKER: I think that's right, Judge.

2 THE COURT: All right. I assume there is no
3 disagreement as to that, Mr. Dornan?

4 MR. DORNAN: No, your Honor.

5 THE COURT: All right. We will correct the record --
6 thank you, Mr. Becker -- 120 months on Counts IV through VII
7 to run concurrent with the 300-month term on Count I.

8 And so Mr. Becker, do we have the statutory maximum
9 incorrect on the sentencing recommendation, too? Because
10 perhaps we need to get that corrected for the record.

11 MR. BECKER: Yeah, on the -- the sentencing
12 recommendation lists the statutory -- it lists the statutory
13 provision for Counts IV through VII as zero to 20 years. That
14 should be zero to 10 years.

15 THE COURT: All right. We will get that corrected.
16 Thank you.

17 Let me back up. Mr. Becker, no objections to the special
18 conditions of supervised release?

19 MR. BECKER: That's correct, your Honor.

20 THE COURT: All right.

21 Mr. Dornan.

22 MR. DORNAN: We would object to the term of the
23 lifetime supervision, Judge.

24 THE COURT: Okay. But on the special conditions of
25 supervised release?

1 MR. DORNAN: No, your Honor.

2 THE COURT: All right. The special conditions of
3 supervised release will be imposed. The standard conditions
4 will also apply.

5 And I will note that when someone is out on supervised
6 release and is doing very well and does not appear to any
7 longer impose any threat to society, it is possible for an
8 individual to be discharged from supervised release before the
9 end of the term.

10 I recommend to the Bureau of Prisons that the defendant
11 receive credit for time served.

12 I recommend that the defendant be placed in a facility
13 where he can receive sex offender-specific treatment.

14 And of course, Mr. DeFoggi, you have a right to appeal
15 from your conviction and the sentence that I've imposed. Any
16 notice of appeal needs to be filed within 14 days of the
17 filing of the judgment.

18 When we're done with the hearing, the courtroom deputy is
19 going to show you a form that outlines the right of appeal and
20 explains how to file a notice of appeal.

21 Please read through the form and then sign it, just
22 indicating that you've read it. Signing the form is not the
23 same thing as submitting a notice of appeal.

24 If you have any question about whether you should appeal,
25 you should discuss the matter with Mr. Dornan. The ultimate

1 decision is up to you.

2 Do you have any question for me about your right of
3 appeal?

4 THE DEFENDANT: No, your Honor.

5 THE COURT: Okay. Have I neglected anything,
6 Mr. Becker?

7 MR. BECKER: No, your Honor.

8 THE COURT: Mr. Dornan?

9 MR. DORNAN: Judge, as far as a recommendation,
10 Mr. DeFoggi would like to be placed as close to the
11 Washington, D.C. area as possible.

12 THE COURT: Okay. I will recommend that he be given
13 consideration for placement in a facility as close as possible
14 to Washington, D.C. so he can be near home and family.

15 And I'll just note that the Butner facility, which is the
16 one in North Carolina near Raleigh, is the most likely
17 placement considering the recommendation for sex offender-
18 specific treatment.

19 But when they decide he's received the maximum benefit of
20 that treatment, it's possible he might get closer to D.C. But
21 regardless, it's not too far.

22 MR. DORNAN: Thank you.

23 THE COURT: Very good.

24 The defendant is remanded to the custody of the U.S.
25 Marshals to be delivered to the Bureau of Prisons.

1 Thank you. We're adjourned.

2 MR. BECKER: Thank you, your Honor.

3 MR. NORRIS: Thank you.

4

5 (Adjourned at 3:38 p.m.)

6

7

8

9 I certify that the foregoing is a correct transcript from
10 the record of proceedings in the above-entitled matter.

11

12 /s Brenda L. Fauber
Brenda L. Fauber, RDR, CRR

1-20-15

Date

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I-N-D-E-X

EXHIBITS:OfferedRuling

307. Evidence Recovery Log

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308. FBI Report

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8

309. Statement

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